

MARINE MAMMAL COMMISSION  
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**Specific Comments on the National Marine Fisheries Service's Proposed Rule to Authorize Taking of Marine Mammals Incidental to Operational Use by the U.S. Navy of the SURTASS LFA Sonar (66 Federal Register pp.15375-15393)**

Page **15376, col. 1**, par. 1: This paragraph indicates that the Navy has applied for an incidentat taking authorization to operate the SURTASS LFA sonar for a period of time not to exceed **five years**. Presumably, hbwever, the Navy plans to use the sonar for an indefinite period of time, and requested the taking authorization for five years because that is the maximum period of time for **which** a taking authorization can be obtained under section **101(a)(5)(A)** of the Marine Mammal Protection Act (the Act), This should be made clear in any taking authorization that is issued, Also, possible cumulative effects beyond the requested five-year authorization should be considered in **the** development of the monitoring and reporting requirements included as a condition of **any** authorization that is issued.

Page **15378, response** to comment **12**: In this response to an expression of doubt as to whether the **numbers** of marine mammals likely to be taken incidental to the proposed action would constitute "small **numbers**" as envisioned in the Act, the **Federal Register** notice states –

The **definition** of the term "small numbers" at 50 **CFR** 2 16.103 differs from **the commenters'** interpretation of "'small numbers.'" NMFS believes it was **unfortunate** that Congress was unable to provide more specific guidance on what it meant by the **term** "small." The Legislative history for this provision (H. Rept. 97-228, **September** 16, 1981) stated that the Committee recognized "the imprecision of the term . . . , but was unable to offer a more precise formulation because the concept is not capable of being **expressed** in absolute numerical limits,"

Although the statement from the referenced report is accurate, it is a selective quotation that does not **reflect** the entirety of Congressional **intent** regarding the 198 **1** additions of sections 101(a) (4) and : (5) to the Act. The report language goes on to indicate that the determinations of "small numbers" and "negligible impact" are intended to serve as separate standards restricting the authority of **the** Secretary, As the report states –

The term '**negligible**' is intended to mean an impact which is able to be disregarded. In this regard, the Committee notes that Webster's Dictionary defines the term 'negligible' to mean 'so small or unimportant or of so little consequence as to warrant little or no attention.' Unless a **particular** activity rakes only small numbers of marine mammals, **and** [not or] that taking has a negligible impact on the species, the new provisions of **Sections**, 101(a) (4) and (5) j are not applicable to that activity [emphasis added].

Further excerpts regarding this point are provided in the Commission general comments. In line with the report language as a whole, any regulations issued to give effect to these provisions need to make separate findings that only small numbers of marine mammals will be taken incidental to the activity in question and that the effects on the distribution, size, and productivity of the affected species and populations will be negligible.

Page 15380, col. 2: The second and third sentences in this column state that –

NMFS recognizes that the Navy should provide supporting evidence of the efficiency of the HFM3 sonar based on documentation of its effectiveness or field testing results. As a result, until such time as the Navy provides verifiable test results on the HFM3 sonar, NMFS will need to base its determination of negligible impact solely on the effectiveness of geographic mitigation

The Service recognizes that the effectiveness of the proposed mitigation measures will depend largely on the capability of the HFM3 sonar to detect individual marine mammals and groups of animals within and approaching the proposed 180 dB safety zone. However, as the Service notes, that capability has yet to be documented. In this regard, the Service is proposing that the HFM3 sonar be tested as part of, rather than before, the first of the LFA sonar exercises that would be conducted under the proposed incidental taking authorization. Further, the Service has not indicated in the *Federal Register* notice the standards that the HFM3 sonar will need to meet to be judged capable of effectively detecting different species and sizes of marine mammals in or approaching the 180 dB safety zone.

Elsewhere, the *Federal Register* notice indicates that mortality and serious injury of marine mammals will be prevented or minimized by suspending operations if they are detected inside the proposed 180 dB safety zone, and that the HFM3 sonar is expected to provide 70 to 80 percent effectiveness in detecting marine mammals within that zone. Inasmuch as the proposed negligible impact determination relies heavily on the expected effectiveness of the HFM3 sonar, it seems that information confirming the system's capabilities is necessary before a determination of negligible impact can be made. In this regard, the Service indicates on page 15377, in response to Comment 8, that "... a final rule will not be promulgated by NMFS unless the Agency makes a finding of negligible impact based on all relevant information acquired during the rulemaking process" [emphasis added]. Thus, the Service's own statement underscores the need to obtain information on the effectiveness of the HFM3 sonar system prior to making a negligible impact determination. The Commission therefore recommends that the effectiveness and the safety of the sonar be demonstrated before any incidental taking is authorized.

Further, since 20-30 percent of the animals that may be in the safety zone prior to and/or during operations are apparently unlikely to be detected, prevention of serious injuries or mortalities as a result of LFA operations may not be possible.

**Pages 15380 and 15381, response to comment 23:** This response, while recognizing that operation of the LFA sonar is likely to **affect** the behavior of marine mammals beyond the proposed 180 **dB safety** zone, suggests that the Service (1) assumes that the effects will be negligible **because** the exposures will be **intermittent** and relatively **short** (6 to 100 seconds), and (2) does not **intend** to require **verification** of its assumption that behavioral effects will be negligible because the proposed monitoring program is **unlikely** to be effective at the distances where **behavioral** effects may occur. That is, the Service states ~

While **the commenter** is correct that behavioral modifications can be expected: at lower **SPLs**, the proposed monitoring (visual, passive acoustic and active acoustic), is not likely to be as effective at the **greater** distances where these impacts are likely to occur. **As** a result, **NMFS** prefers to require **the** Navy to **concentrate** monitoring in an area wherein marine **mammals** are more likely to incur an injury, than at distances wherein the incidenta. taking **will** be limited to short-term behavioral modifications,

Neither the *Federal Register* notice nor the **FEIS** for the **SURTASS** LFA sonar provides data or **analyses** to support the assumption that **intermittent** and relatively short-term behavioral disruptions will not affect the survival or productivity of individual marine mammals or the populations they comprise - i.e., that the proposed mitigation measures will prevent injury as **reflected in the Act's** definition of "harassment." Thus, to comport with the provisions of **the** Marine Mammal Protection Act, the Service, before issuing the proposed incidental taking authorization (1.) needs to provide an adequate **rationale** to support this assumption, and/or (2) needs to augment the monitoring program to ensure **that** the information necessary to confirm the validity of the **assumption** is obtained.

**Page 15381, response to comment 25:** In this response, the Service indicates that it is proposing to establish a system for expanding the number of offshore biologically important **areas** where use of the LFA sonar **will** be restricted and that it will not act on proposals or recommendations for additional offshore biologically important areas until the ongoing **rulemaking** has been completed. It indicates **further** that (1) an area would have to be particularly important for breeding, feeding, or migration, and not simply an area where marine mammals are commonly **present**, in order to be designated an offshore biologically important area; (2) persons or organizations proposing designation of additional offshore biologically important areas would be required to submit sufficient **information** to show that the areas are of **significant** biological importance before **rulemaking** would be initiated; and (3) **rulemaking** to designate **all** offshore biologically important areas is anticipated to take **8 t.o** 12 months.

This proposed system appears to be predicated on possibly faulty reasoning and several **unstated** assumptions. For example, it appears to **assume** that operating the **LFA** sonar in areas where marine mammals concentrate for feeding, breeding, or other purposes, but which have not been designated offshore biologically important areas, will in no way be inconsistent with the "negligible impact" determination. Likewise, it appears to assume that no information

currently exists which would support designation of offshore biologically important areas not already identified in the *Federal Register* notice.

With respect to the last point, the marine mammal distribution and abundance data collected during the ATOC Marine Mammal Research Program very well might support designation of the Pioneer Sea Mount as an offshore biologically important area. Likewise, distribution and abundance data reported in environmental impact statements for oil and gas exploration and development offshore southern California (e.g., the EIS for Outer Continental Shelf Sale No. 48) very well might support designation of other areas, such as the Tanner Banks and the Santa Rosa-Cortez Ridge, as offshore biologically important areas. Thus, if it has not already done so, the Service should carefully examine all available marine mammal distribution and abundance data to ensure that there are no additional sea mounts or other areas possibly meriting designation as offshore biologically important areas before proceeding with the rule as proposed. Further, the Service should describe the procedures that will be followed if data become available suggesting that continued operation in an area is having, or may have, more than a negligible impact on the marine mammal species or stocks concerned.

**Page 15383, response to comment 38:** In this response, the Service indicates that it cannot require the Navy to undertake a particular level and type of research outside the purview of the proposed authorization, but that it strongly encourages and expects that the Navy will provide a detailed plan for research to determine impacts on species of marine mammals that may potentially be affected by low frequency sounds. However, it is not clear when this would be done or whether the public would be given the opportunity to comment on the plan. The previously referenced House of Representatives' report concerning the Act's 1981 amendments (H.R. Report No. 97-223) states, among other things, that "... the Committee expects that persons operating under the authority of section 101(a)(5) shall engage in appropriate research designed to reduce the 'incidental taking of marine mammals pursuant to the specified activity concerned.'" This language suggests that, given the uncertainties concerning the biological significance of the expected effects of the LFA sonar on marine mammal behavior, the Service has not only the authority, but the responsibility to require that research or monitoring capable of resolving the uncertainties be made a condition of any incidental taking authorizations issued. Thus, the detailed research plan expected to be provided by the Navy should be submitted, made public, and considered in the process of deciding whether the requested incidental taking authorization can be issued.

**Page 15383, response to comment 41:** Among other things, this response indicates that "the Navy has stated that the data from the LTM [long term monitoring] program cannot be available in real-time because of post-mission analysis requirements including declassification of sensitive national security information" and that "the Navy has proposed that this information be provided annually." Elsewhere, the *Federal Register* notice indicates that the Service proposes to require that monitoring and related information be submitted annually, 90 days before expiration of letters of authorization, which may be issued for periods of one year.

Data on the species, numbers, and activities of animals seen in and outside the proposed 180 dB safety zone, and any apparent overt responses to the LFA sonar transmissions, could suggest additional offshore areas of biological importance that should be avoided and help validate or invalidate the assumptions upon which the proposed negligible effects determination is based. There is no apparent reason why such raw data should be classified or should not be provided to the Service within a few days or weeks after the conclusion of each LFA training exercise conducted during the one-year periods of incidental taking authorization. Therefore, either better justification for the proposed reporting requirements should be provided, or the requirements should be expanded to require that data on the species, numbers, and activities of marine mammals observed during training exercises be submitted to the Service and made publicly available immediately following each exercise, as well as to require annual in-depth reporting and analysis of observational and related-activity data.

Page 15385, col. 3: The first complete section in this column states that "Descriptions of the PE and AIM models, including AIM input parameters for animal movement, diving behavior, and marine mammal distribution, abundance, and density are described in detail in the Navy application and the draft OEIS/EIS and are not discussed further in this document." As noted earlier, the density estimates used to calculate the numbers of marine mammals that could be taken incidental to the proposed action are based on an assumption that almost certainly is not valid – i.e., that all of the potentially affected species are distributed randomly or uniformly and consequently are unlikely to be present in significantly greater densities in any areas that have not been designated as offshore biologically important areas. Also, it is not clear how the movement of the ship during the anticipated 9-day exercise segments was factored into the calculations. Both of these points should be addressed in the final rulemaking.

**Pages 15385 and 15386, Risk Analysis:** Among other things, the first paragraph in this section states that "In this analysis, behavioral harassment is defined as a significant disturbance of a biologically important behavior." This definition differs from the definition of Level I3 harassment in the Act. The final rule therefore should be revised to either reflect the statutory definition of Level B harassment or to explain the legal and scientific rationale for using the alternative definition.

Also, it appears from the discussion in this section that both the Navy and the Service have concluded that received levels of low frequency sounds below 180 dB are unlikely to cause either temporary hearing threshold shifts or significant disruption of feeding, breeding, or other biologically important behaviors. Although some data are provided to support the conclusion that exposure levels below 180 dB are unlikely to cause TTS, no data are provided to support the conclusion that exposure levels below 180 dB will not cause significant disruption of any biologically important behaviors,

With regard to this last point, the third paragraph in the first **column** on page **15386** states –

Because the LFS **SRP** failed to document any extended biologically significant response at maximum **RLs** up to **150 dB**, the **Navy** determined that there was a 2.5 percent value of a risk of an animal incurring a disruption of biologically important behavior at an SPL of **150 dB**, a 50-percent risk at **165 dB**, and a 95-percent risk at **180 dB**.

However, the Service provides no indication of what is meant by “extended biologically significant response” or how this term conforms to the statutory definition of “harassment.” The final regulations should clarify its use of this term and explain its relationship to the statutory definition – i.e., is the Service suggesting that a response must not only be biologically significant, but of an extended nature to constitute harassment?

**Page 15387:** The last sentence in the paragraph beginning in column 1 and ending in column 2 states that –

NMFS believes that the potential effect by SURTASS LFA sonar operations will be limited to only small percentages of the affected stocks of marine mammals and that potential effects will be limited to incidental harassment that will not adversely affecting [sic] the stock [sic] through annual rates of recruitment or survival .

As noted earlier, the estimates of the percentages of stocks that could be affected by the LFA sonar operations appear to be based on an unreasonable assumption – i.e., that marine mammals are distributed randomly or uniformly in the areas of concern. Also, there is no indication of what the Service considers a “small percentage.” With regard to the last point, Tables 4.2-1 1, -12, -13 and - 14 in the FEIS indicate that, in some areas, more than 10 percent of certain stocks, including several stocks of endangered cetaceans, could be affected. The rationale for considering these percentages to constitute “small numbers” is not, but should be, explained.

**Page 15387, col. 3:** The last paragraph in this section indicates that the Navy and the NMFS have collectively proposed establishing four offshore biologically important areas where LFA sonar operations would be restricted because marine-mammals congregate in high densities in those areas to carry out biologically important activities. As noted earlier, it is not clear whether the Navy or the Service has reviewed available information to determine whether additional areas, such as the Pioneer Sea Mount, Tanner Banks, and Cortez Ridge, merit designation as offshore biologically important areas.

**Page 15388, Monitoring:** The first sentence in this section states **that –**

**In order to minimize risks to potentially affected marine mammals that may be present in waters surrounding SURTASS LFA sonar, the Navy has proposed to;** (1) conduct visual **monitoring from the ship's bridge** during daylight hours, (2) use passive SURTASS LFA sonar to listen for vocalizing marine mammals; and (3) use high frequency active sonar (i.e., similar to a commercial fish finder) to monitor/locate/track marine mammals in relation to the SURTASS LFA sonar vessel and the sound field produced by the SURTASS LFA sonar array [emphasis added].

As noted earlier, the legislative history and related provisions of section 101(a)(5) of the Act indicate that the intent of the monitoring requirement is to confirm that animals are taken only in the numbers and by the means authorized and that the effects of the taking on the size and productivity of the affected stocks are in fact negligible. Although the steps proposed by the Navy are appropriate measures to help ensure that any authorized taking will have the least practicable adverse impact on the affected marine mammals, a more comprehensive monitoring program is needed to help assure that the proposed action does in fact have negligible population-level effects. The Commission recommends that the Service include the following elements in the program related to monitoring and reporting:

1. Augmenting the proposed passive acoustic monitoring program to determine whether there are differences in the nature or frequency of marine mammal vocalizations following LFA sonar transmissions that may be indicative of behavioral disruptions beyond the proposed 180 dB safety zone;
2. Routinely examining observational data collected during the LFA sonar exercises to help identify additional marine mammal concentration areas that should be designated as offshore biologically important areas;
3. Designing and conducting a series of directed experiments, as recommended in the National Research Council's May 2000 report, *Marine mammals and low frequency sound: progress since 1994*, to document how representative species and age-sex classes of marine mammals respond to different types and levels of low frequency sounds; and
4. Undertaking an analysis to determine the changes in the size, range, and productivity of potentially affected species and stocks that could be detected by the survey programs currently being conducted by the Service, the Navy, the Minerals Management Service and others, and then taking such steps as necessary to coordinate and augment the programs to provide the capability for detecting biologically significant changes in representative species and stocks.

On a related **matter**, this section indicates that "NMFS will not consider the effectiveness of the **HFM3** sonar in reducing the incidental take of marine mammals by the SURTASS LFA sonar until such time as the Navy **has** demonstrated its effectiveness." As noted earlier, the **HFM3** sonar is expected to provide the principal means for assuring that marine mammals are not **within** the proposed 180 **dB** safety zone during operation of the **LFA** sonar. Thus, determining the effectiveness of the **HFM3** sonar appears to **be** an essential element in arriving at a negligible impact tiding, **that** needs to be considered in the process of assessing the possible **effects** of the proposed action, **rather** than being **left** to a later date.

Page 15388, Reporting: If changes in any of the demographic parameters of **the** potentially **affected** marine mammal populations are detected months or years **after** the initiation of the proposed action, retrospective analyses will be required to determine whether the SURTASS LFA sonar operations may have caused or contributed to the changes. Thus, the Service should determine, and **specify in** the final regulations, the **operational** and other information that will be required to be reported in order to enable the best possible retrospective analyses if changes in the demography of any of the potentially **affected** marine mammal populations are detected. Minimally, there should be a requirement to maintain records and report the dates, times, and locations of each **exercise**, including the number, duration and times between transmissions (pings), and **all** observations of marine mammals during **or** incidental to the required monitoring.

**Page 15388, Research:** This section indicates that --

The Navy **proposes** to provide a LTM [long term monitoring] program to conduct annual assessments of the potential cumulative impact of **SURTASS** LFA sonar operations on the marine environment., ,

and that --

While NMFS believes that research conducted to date is sufficient to **assess** impacts **on those** species of marine mammals that were identified in public meetings as most susceptible to LF noise, it believes that it would be prudent to continue research over the course of the period of effectiveness of these regulations.

As **noted** earlier, the preliminary determination that the proposed action is likely to have **negligible effects** on the **potentially affected** marine mammal species and populations is based on a number of **assumptions**. Also as noted earlier, the legislative history of section 101(a)(S) of the Act indicates that Congress intended that research requirements should be included in small-take authorizations whenever there is significant uncertainty concerning how and how many marine mammals might be affected by the activity in question. Therefore, the Navy's proposal for **long-term research** to **verify** that the proposed action does not have significant cumulative effects should be included in and evaluated as part of the proposed action.



**Page 15388, Proposed Letters of Authorization Conditions:** This section indicates that, in order to allow the Service to respond promptly to changing conditions, the proposed regulations have been designed to allow many of the mitigation, monitoring, and reporting requirements to be detailed in the letters of authorization, rather than in the regulations. As noted in the Commission's general comments, the applicable statutory provision specifies that at least some of these elements be specified in the regulations themselves and not be deferred until the issuance of letters of authorizations. This section also indicates that an opportunity for public comment would be provided for "substantial modifications" to letter of authorization requirements before such modifications are made. However, the Service provides no indication of what would be viewed as a substantial modification. Thus, the public and interest groups concerned about the possible cumulative effects of the proposed action are given no indication of the kinds of modifications that could or could not be instituted by the Service without their knowledge or opportunity for comment. Minimally, the final regulations should specify the non-substantial modification that could be made without opportunity for public comment.

This section also indicates that:

- (1) Prior to each exercise, the marine mammal safety zone will be measured to determine the distance from the source to the 180 dB isopleth [sic]. That distance will be the established safety zone for the exercise; and
- (2) The Navy must test the effectiveness of HFM3 at detecting marine mammals within 0.5 km (0.3 nm), 1 km (0.54 nm) and 2 km (1.1 nm) of the source. A report must be provided to NMFS not later than 120 days prior to the expiration of the first letter of authorization.

The first of these proposed conditions appears to assume that the sound transmission characteristics of the ocean will remain constant during each exercise (i.e., for periods up to 30 days) and over the distances that the ship will travel during the exercises (e.g., 5.6 km/hr x 24 hrs/day x 20 to 30 days = 2,688 to 4,032 km). It is unlikely that sound transmission characteristics would regularly remain constant over such distances and times. Thus, this condition should either be revised or justified better in the final regulations,

The second of these proposed conditions indicates that the Navy must test the effectiveness of the HFM3 sonar during the first exercises conducted under a letter of authorization issued in accordance with the proposed regulations. There is no indication of what would be considered "effective" with regard to detecting various species of marine mammals at the distances listed, or what the consequences would be if the sonar failed to meet the expectations. Given, as noted earlier, that the "negligible effects" determination is based in part on the assumption that the HFM3 sonar will be able to detect at least 70 percent of the marine mammals within the 180 dB isopleths, it would seem that minimum performance standards should be established and the testing should be done to demonstrate that the HFM3 sonar meets those standards before the proposed regulations are finalized.

## 10

**Pages 15388 and 15389, Designation of Biologically Important Marine Mammal**

**Areas:** The system proposed for designation of additional offshore **biologically** important areas **inappropriately** places the burden on the public to show that (1) **offshore** areas where marine mammals are **observed** to concentrate are important for breeding, feeding, or other particularly significant biological functions, and (2) conducting LFA sonar exercises in and near known concentration areas while deciding whether the areas merit designation as offshore biologically important areas will in no way **affect** the "negligible effects" determination – *e.g.*, would pose no risks not **identified** or that would not be avoided or mitigated by the monitoring and related measures described in the **FEIS** and *Federal Register* notice. **Placing** the burden on the public to show **that offshore** areas are important for marine mammal breeding, feeding, or migration is contrary to the **provisions** of section 101(a)(5)(B), which requires the Service to withdraw or suspend the **authorization** to take marine **mammals** under the small-take provision if, among other things, it determines that the taking "within one or more regions is having, or may have, more than a negligible impact on the species or stock concerned" [emphasis added], That is, all that a proponent of an additional offshore: biologically important area is statutorily required to demonstrate is **that** there is a **reasonable** possibility that **SURTASS LFA** activities within the area could have more than a **negligible** impact on the **affected** marine mammal species or stocks. Once such a showing has been made, the burden **shifts** back to the applicant and/or the Service to demonstrate **that** allowing operations in the area does not exceed the negligible impact threshold. Section 216.191 of the proposed regulations should be revised to reflect these relative burdens of proof. The Service **needs** to clarify that the proponent of a designation has met its burden by showing that marine **mammals** occur in the area in above average densities (*i.e.*, densities **significantly** above those used to calculate the percentages of populations that could be affected by the proposed action), and that there is a reasonable basis for believing that the area is important for one or more: biologically significant. functions. In keeping with the requirements of section 101(a)(5)(B), LFA sonar operations should be suspended in and near these areas until it **has** been determined that. such operations will not have more than a negligible impact on those species or stocks.

**Page 15389, Preliminary Conclusions:** Among other things, this section indicates that the Service concurs with the Navy's determination that, –

the incidental taking of marine mammals resulting from **SURTASS LFA** sonar operations would result in only small numbers (as the term is defined in § 216.103) of marine **mammals** being taken, have no more than a negligible impact on the **affected** marine **mammal** stocks or habitat and not have an **unmitigable** adverse impacts on Arctic subsistence uses of **marine** mammals.

It further states that –

These conclusions are particularly supported by the proposed mitigation measures that would **be** implemented for **all** SURTASS LFA sonar operations and the proposed LTM [long term monitoring] program. This includes geographic operation restrictions, mitigation measures to prevent injury to any marine mammals, monitoring and **reporting** and supplemental research that will result in increased knowledge of marine mammal species, and the potential impacts of LF sound on these species. The latter measures offer the means of learning of, **encouraging**, and coordinating research opportunities, plans, and activities relating to **reducing** the incidental taking of marine mammals **from** anthropogenic **underwater** sound, and evaluating the possible long-term effects from exposing marine mammals to anthropogenic underwater sound [emphasis added].

Earlier, the *Federal Register* notice indicates that the purpose of the proposed mitigation measures is to **minimize**, not prevent, injury (Level A harassment) of marine mammals. Further, as noted **previously**, the presumed effectiveness of the proposed mitigation measures is based in part on the **assumption** that the HMF3 sonar will be at least **70** percent effective in detecting marine mammals approaching or within the 180 dB isopleth. Also, neither the proposed long term monitoring program nor the supplemental research program is described in either the FEIS or the *Federal Register* notice. Consequently, the conclusions must either be modified or better supported before a final rule is published.

**Page 15390, Section 216.180(b).** Here and elsewhere the *Federal Register* notice indicates that the proposed regulations would authorize “The incidental take by harassment and non-serious **injury** of marine mammals . . . .” There is no indication of what is meant by **non-serious injury** or how such injury differs from “Level **B** harassment” as defined in the Act’s 1994 amendments. The final regulations should clarify this point and ensure consistency with the Act’s definition of harassment.

**Page 15392, Section 216.185, Requirements for monitoring:** Subsection (a) of this section states that –

In order to mitigate the taking of marine mammals by SURTASS LFA sonar to the **greatest** extent practicable, the Holder of a Letter of Authorization must: (1) Conduct visual **monitoring** . . . , (2) Use **the** SURTASS LFA sonar to listen for vocalizing marine mammals; and (3) Use high frequency active sonar to locate and track marine mammals in **relation** to the SURTASS LFA sonar vessel and sound field produced by the SURTASS LFA sonar source array [emphasis added].

Earlier the *Federal Register* notice indicates that the purpose of the proposed monitoring is to minimize, not **mitigate**, the taking of marine mammals incidental to the proposed action. In this

regard, the **proposed** monitoring can reasonably be **expected** to minimize the number of marine mammals taken by Level **A** harassment, only if the HMF3 sonar and the visual and passive **acoustic monitoring** are as effective as hypothesized. However, the monitoring is neither designed to, nor **will** it, **mitigate** the effects of any taking that occurs. Further, consistent with the provisions of **section 101(a)(5)** of the Marine Mammal Protection Act, the purpose of the monitoring program should be to confirm that animals are taken only in the ways and numbers authorized and **that** there are no non-negligible population level effects. This section of the final regulations **should** be revised accordingly.

**Also**, this **section** and the following sections ("**Requirements for reporting**" and "**Applications for Letters of Authorization**") describe things that must be done by the Holders of letters of **authorization**. However, they provide no indication of who the Holder(s) are expected to be – *e.g.*, the **captains** of the ships carrying the LFA sonars, the **officers** responsible for operations in the **different** geographic areas, or some other entity or combination of entities. The effectiveness of **the** monitoring and reporting requirements will depend in part on who is **responsible for meeting** them and on those persons fully understanding their responsibilities. Thus, the **final regulations** should indicate who will hold, and be responsible for meeting the requirements of, **any** letters of authorization that are issued.

**Page 15393, Section 216.191, Designation of Biologically Important Marine Mammals Arcas:** As noted earlier, the proposed system for designating additional offshore **biologically important** areas appears contrary to the intent and provisions of the Act in that it would **shift** the **burden** from the Navy and the **Service** to show that the taking in all areas where the LFA sonar **will** be used has a negligible impact on the affected species and **stocks** of marine mammals, to **the public** to **show** that (1) **areas** where marine mammals are observed to concentrate in **greater** than average densities are important for feeding, breeding, or other **biologically important** functions and (2) LFA sonar operations in those areas would have more than negligible **effects**. This provision should be revised to reflect the statutory framework by affording protection to areas where higher than average densities are observed until such time as it is determined **that the** areas are not important for feeding, breeding, or other biologically significant functions.